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October 18, 1996

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OCT 18 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

*ADMITTED MD ONLY

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: L.M. Communications II
of South Carolina
WNST(FM), Moncks Corner, SC
MM Docket No. 94-70
RM-8474, RM-8706

Dear Mr. Caton:

On behalf of L.M. Communications II of South Carolina, Inc. ("LMC"), licensee of FM radio broadcast station WNST, Moncks Corner, South Carolina, I am transmitting herewith an original and four copies of LMC's Opposition to the Petition for Reconsideration of the Allocation Branch's Report and Order (DA 96-1149) filed by Sampit Broadcasters on September 13, 1996. Under Section 1.429(f) of the Commission's rules, an Opposition to the Sampit Petition for Reconsideration was due on October 8, 1996 (see also 61 Fed. Reg. 49972 (1996)). On October 4, 1996, with consent of counsel to Sampit, LMC requested a 10-day extension of time, to and including October 18, 1996, to reply to the Sampit Petition for Reconsideration. See LMC Opposition at Ex. 1. Accordingly, this opposition is timely filed.

Should there be any questions concerning this matter please contact the undersigned.

Sincerely,

Linda D. Feldmann

Linda D. Feldmann

No. of Copies rec'd 014
List A B C D E

Enclosures

cc (w/encls.): Mr. John Karousos (By hand delivery)
Ms. Sharon P. McDonald (By hand delivery)

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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OCT 18 1996

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments,)
FM Broadcast Stations.)
(Moncks Corner, Kiawah Island, and)
Sampit, South Carolina))

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY
MM Docket 84-70
RM-8474
RM-8706

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

OPPOSITION TO SAMPIT BROADCASTERS
PETITION FOR RECONSIDERATION

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October 18, 1996

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SUMMARY

In a Report and Order released July 17, 1996, the Allocations Branch rejected proposed allotments requested by both WNST - the substitution of Channel 288C2 for Channel 287C3, the reallocation of Channel 288C2 from Moncks Corner to Kiawah Island, South Carolina, as that community's first local transmission service, and the modification of Station WNST's license accordingly — and Sampit Broadcasters — the allocation of Channel 288A to Kiawah Island, the substitution of Channel 287A instead of Channel 287C3 at Moncks Corner, and the allocation of Channel 289A to Sampit, South Carolina.

On September 13, 1996, Sampit Broadcasters petitioned for reconsideration of the Report and Order's determination that Sampit, South Carolina is not a "community" for allotment purposes. This Opposition demonstrates that the Commission correctly determined that Sampit, South Carolina is not a "community" for allotment purposes and thus denied Sampit's counterproposal.

L.M. Communications II of South Carolina ("LMC") demonstrates herein that under existing Commission precedent, Sampit's Petition for Reconsideration is procedurally defective because, in contravention of Section 1.429(b) of the Commission's rules, it attempts to submit new matter that should have, and could have, been raised during the comment and reply comment period of this allotment proceeding. LMC further demonstrates that the Commission's careful analysis of the timely evidence submitted by Sampit at the comment and reply comment stage correctly concluded that Sampit, SC is not a community for FCC allotment purposes. LMC respectfully submits that the Commission must uphold this finding.

Finally, even if the Commission considers the new evidence submitted by Sampit with its Petition for Reconsideration, LMC herein demonstrates that Sampit has failed to make the showing requisite in allotment proceedings that Sampit, SC is a community with "geographically identifiable population groupings" with a "nexus" to Sampit, SC. Accordingly, for all of the reasons stated herein, LMC respectfully submits that the Commission must deny the Petition for Reconsideration filed by Sampit Broadcasters in this proceeding.

BEFORE THE
Federal Communications Commission

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MM Docket No. 94-70

RM-8474

RM-8706

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**OPPOSITION TO SAMPIT BROADCASTERS
PETITION FOR RECONSIDERATION**

L.M. Communications II of South Carolina, Inc. ("LMC"), licensee of Station WNST(FM) (formerly WJYQ(FM)), Moncks Corner, South Carolina, by its attorneys and pursuant to Section 1.429(f) of the Commission's rules, hereby opposes the "Petition for Reconsideration," filed by Sampit Broadcasters ("Sampit"), in the above-captioned proceeding.¹

Sampit seeks reconsideration of the Allocations Branch Report and Order (DA 96-1149), released July 19, 1996 (the "Report and Order"). LMC respectfully submits that the Petition

¹ Under Section 1.429(f) of the Commission's rules, an Opposition to the Sampit Petition for Reconsideration was due on October 8, 1996 (see also 61 Fed. Reg. 49972 (1996)). On October 4, 1996, with consent of counsel to Sampit, LMC requested a 10-day extension of time, to and including October 18, 1996, to reply to the Sampit Petition for Reconsideration. See Exhibit 1. Accordingly, this opposition is timely filed.

for Reconsideration filed by Sampit on September 13, 1996 ("Sampit Petition") should be denied as a matter of law. In support whereof, the following is shown.

I. INTRODUCTION

At the request of WNST, the Commission issued a Notice of Proposed Rule making, 9 FCC Rcd 3136 (1994) ("NPRM"), proposing the substitution of Channel 288C2 for Channel 287C3, the reallocation of Channel 288C2 from Moncks Corner to Kiawah Island, South Carolina, as that community's first local transmission service, and the modification of Station WNST's license accordingly. In response to the NPRM, Sampit filed comments and a counterproposal (RM-8706) (the "Counterproposal") which proposed a series of interdependent changes to the FM Table of Allotments: the allocation of Channel 288A to Kiawah Island, the substitution of Channel 287A instead of Channel 287C3 at Moncks Corner, and the allocation of Channel 289A to Sampit, South Carolina. Public Notice of the Counterproposal was given on October 11, 1995. Numerous related pleadings were filed by both parties in response to the NPRM and the Counterproposal. In a Report and Order released July 19, 1996, the Allocations Branch rejected the proposed allocations requested by both WNST and Sampit.

On August 19, 1996, WNST timely filed a petition for reconsideration of the Report and Order which demonstrated that a suitable site for Channel 288C2 at Kiawah Island is indeed available. Substantive discussion of that portion of the Report and Order is thus not addressed in the instant Opposition. Rather, this Opposition demonstrates that the Commission correctly determined that Sampit, South Carolina is not a "community" for allotment purposes and denied Sampit's Counterproposal.

II. DISCUSSION

A. Sampit's Petition for Reconsideration Is Procedurally Defective.

In the Report and Order, the Commission correctly determined that Sampit, SC is not a "community" for allotment purposes primarily because "no nexus [had] been shown between the political, social and commercial organizations and the community in question." Report and Order at 8. At the eleventh hour, Sampit has now improperly attempted to correct this deficiency by submitting new information which is intended to demonstrate that Sampit, SC is a community for FCC allotment purposes. Pursuant to Section 1.429(b) of the Commission's Rules, however, the Commission must deny Sampit's Petition on procedural grounds because Sampit failed to raise this new information on a timely basis, during the comment and reply comment period, and has failed to provide any let alone a compelling reason why it was unable to submit this information on a timely basis.

Section 1.429(b) of the Commission's rules provides that a Petition for Reconsideration which relies on facts which have not previously been presented will be accepted only under the following limited circumstances: (1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission; (2) the facts relied on were unknown to the Petitioner until after its last opportunity to present them to the Commission, and the petitioner could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or (3) the Commission determines that consideration of the facts relied on is required in the public interest. 47 C.F.R. § 1.429(b). The new information included in

Sampit's Petition was known at the time it filed counterproposal and clearly could have been presented then. Further, such facts do not relate to any changed circumstances and the public interest does not require that they be considered.

Sampit attempts to submit three types of new evidence: (1) addresses of Sampit commercial entities; (2) "declarations" from Sampit business owners, civic leaders, school officials and residents that they perceive themselves to be members of the Sampit community; and (3) letters from the County Administrator of Georgetown County and a member of the South Carolina State Senate. None of the information contained in these addresses, declarations or letters purports to involve facts which relate to events that have occurred or changed since the comment and reply comment period ended. For example, none of the new information submitted by Sampit shows that Sampit, SC has been incorporated or recognized by the U.S. Census since Sampit last had an opportunity to present information to the Commission.

Similarly, the addresses and letters submitted by Sampit are readily available information and could easily have been obtained and submitted during the comment period. Further, Sampit should have been well aware that under longstanding precedent, the Commission has long relied upon declarations from residents and businesses when determining whether a proposed area is a community for allotment purposes. *See, e.g., Semora, North Carolina*, 5 FCC Rcd 934 (1990). Thus, Sampit does not and could not provide any reason why it could not have filed the declarations attached to its Petition during the comment and reply comment stage. Indeed, the Report and Order acknowledges Sampit's lack of diligence

in this regard, stating "although the proponent lists thirty-nine entities, the proponent does not give addresses of the entities verifying that they specifically identify with Sampit or show that they intend to serve the needs of Sampit as opposed to the communities of Georgetown or Andrews." Report and Order at 8. In fact, as discussed below, the tardily provided addresses of these 39 entities do not verify that they specifically identify with Sampit; they are all Georgetown, South Carolina addresses.

Finally, although Sampit cites Hannahs Mills, Georgia, 7 FCC Rcd 3944 (Policy and Rules Division, 1992) as support for its one sentence argument that submission of its new evidence is in the public interest, Sampit Petition at 7, the facts in that case are easily distinguishable. In Hannahs Mills, the Commission noted that its earlier allotment to the community had been based primarily on the listing of Hannahs Mills as a Census Designated Place ("CDP"). On reconsideration, the petitioner argued that evidence it had previously submitted rebutted the presumption of Hannahs Mills' community status, and also cited cases decided after the Report and Order, supporting the proposition that designation as a CDP was not alone determinative of community status. The Commission reversed its earlier allotment to the community based on the new precedent cited by the petitioner and on the fact that the 1990 Census, which the Commission looked at *sua sponte*, no longer listed Hannahs Mills as a CDP. The decision in Hannahs Mills is thus, clearly inapposite to the instant situation. There is no public interest basis for the Commission to accept Sampit's late-filed information.

In Ellison Bay, Wisconsin, 10 FCC Rcd 8082 (Policy and Rules Division, 1995), a recent allotment case with facts squarely on point with those in this case, the

Commission denied a similar petition for reconsideration as procedurally defective. In *Ellison*, the petitioner requested allotment of Channel 223A to Ellison Bay, Wisconsin, as that community's first local broadcast service. During the initial allotment proceeding, the petitioner, like Sampit, submitted general information regarding Ellison's status as a community. The Commission subsequently found that this "evidence" failed to establish that Ellison Bay qualified as a community for FCC allotment purposes. On reconsideration, the petitioner then attempted to submit a list of businesses, including Ellison Bay addresses,² as evidence of the area's "community" status. The Commission rejected the petitioner's attempt to submit this new information and denied the petition for reconsideration because "the petitioner . . . ha[d] not demonstrated that this is the type of new matter permitted under Section 1.429 of the Commission's Rules. To the contrary, this new matter, consisting mainly of names and address of Ellison Bay businesses, appears to be generally available information that could have been obtained through the exercise of ordinary diligence and submitted at the comment or reply comment state of this proceeding." *Id.* (*emphasis added*).

LMC respectfully requests the Commission to adhere to its long-standing policy in allotment proceedings of "accord[ing] finality to the administrative process and maintain[ing] the status quo when to do so otherwise would add instability to Commission decisions," *Tuscumbia and Selma, Alabama*, 1986 FCC Lexis 3608 (Policy and Rules Division, 1986), and reject Sampit's Petition as procedurally defective because it attempts to

² It is noteworthy that in *Ellison*, even though the addresses submitted by the Petitioner all included the name "Ellison Bay", the Commission still rejected this evidence. In contrast, none of the addresses submitted by Sampit in its Petition have a Sampit mailing address; rather, all the addresses list Georgetown as the community.

submit new matter that should have, and could have, been raised during the comment and reply comment period of this allotment proceeding. See also, Kenansville, Florida, 10 FCC Rcd 9831, 9832, note 7 (1995) (affidavit describing businesses and services attributed to Kenansville not relied upon by the Commission during appeal of an allotment decision where the Commission concluded the evidence was "new evidence, and therefore untimely"); Inglis, Florida, 9 FCC Rcd 4428 (Policy and Rules Division, 1994) (petition for reconsideration in an allotment proceeding denied where the Commission found that a potential conflict caused by the allotment could have been learned of by the petitioner through the exercise of ordinary diligence); Scottsboro, Alabama, 6 FCC Rcd 6111 (Policy and Rules Division, 1991) (petition for reconsideration in an allotment proceeding denied where the petitioner failed to raise the issue of verification on a timely basis during the comment and reply comment period and gave no justification for such failure).

B. Sampit South Carolina Does Not Qualify As a Community for Allotment Purposes

Based on long-standing precedent, the Commission should reaffirm the Report and Order's conclusion that Sampit, SC is not a "community" for FCC allotment purposes. Report and Order at 8. Under the Commission's long standing policy, radio broadcast channels may only be allotted to communities composed of geographically identifiable population groupings. Id. In the Report and Order, the Commission properly relied on the fact that Sampit is neither incorporated nor listed in the U.S. Census, both common indicia used to determine if this requirement is satisfied. Similarly, mere geographic location is not sufficient to establish "community" status. Id. The Report and Order notes that Sampit, SC has a zip code but no post

office. However, the Report and Order further notes that even if Sampit, SC also had a post office, the presence of a zip code and/or post office is not sufficient to establish community status. *Id.*, *citing Coker, Alabama*, 43 RR 2d 190 (1978). Sampit's Petition erroneously concludes that because the Report and Order cites *Coker*, the Commission's decision in the Report and Order is based solely on *Coker*. Sampit Petition at 4. Sampit's confusing argument on this point seems to suggest that the Commission, in "relying" on *Coker*, also misinterpreted the decision by concluding it imposed a "new and novel legal test" requiring the evidence submitted by Sampit in its reply comments to include post office-assigned addresses. *Id.* Sampit's argument is simply not accurate. The Commission did not, as Sampit claims, rely solely on *Coker* as evidenced by the numerous other legal citations given in its discussion of the Sampit allotment. The Commission did not cite *Coker* for the proposition that post-office assigned addresses must be submitted by Sampit as indicia of "community" status; rather, the Report and Order correctly concluded that under *Coker*, even if Sampit, SC had a post office building, either in addition to or instead of its zip code, this evidence would not necessarily reflect that the location was chosen to serve the residents of Sampit. Further, the Commission did not elevate submission of addresses to the level of an "unannounced technical requirement" as Sampit claims; rather, the Commission correctly found that without such addresses, Sampit has failed to demonstrate the nexus between political, social and commercial entities it listed and Sampit, SC as required by well-established Commission precedent.

Commission precedent also requires Sampit to demonstrate that Sampit, SC is composed of a geographically identifiable population grouping by presenting evidence of other

indicia of community status such as political, social, or business organizations, or by providing the testimony of local residents. Hannibal, Ohio, 6 FCC Rcd 2144 (1991). Although Sampit's Counterproposal and Reply Comment listed thirty-nine entities, the Report and Order correctly concluded that Sampit "[did] not give the addresses of the entities verifying that they specifically identify themselves with Sampit or show that they intend to serve the needs of Sampit, as opposed to the communities of Georgetown or Andrews." Report and Order at 8. Thus, the Commission correctly held that Sampit failed to make the requisite showing of a nexus between the political, social and commercial organizations it listed in its pleadings and the Sampit, SC community in question. Id. at 8, *citing* Gretna, Florida, 6 FCC Rcd 633 (1991).

Even assuming, *arguendo*, that the Commission could consider the late-filed new evidence submitted with Sampit's Petition for Reconsideration, Sampit's attempt to demonstrate that Sampit, SC is a community with "geographically identifiable population groupings" having a "nexus" with Sampit, SC falls woefully short. Sampit still fails to provide any evidence that Sampit, SC is incorporated or recognized by the U.S. Census as a Census Designated Place. The area has no form of local government, no post office and no stand-alone zip code -- residents of the area referred to as "Sampit" have Georgetown, South Carolina addresses and zip codes as evidenced by the addresses listed on the 61 Declarations included in Sampit's Petition. Sampit Petition, Attachments 1- 4. All mail sent from the area still bears a Georgetown, South Carolina postmark. Finally, Sampit's Petition contains no evidence that the residents of Sampit receive any municipal services, such as police or water, from any organization or entity associated with Sampit.

In addition, although Sampit has submitted declarations from numerous local businesses, civic organizations and schoolteachers at Sampit Elementary School stating that the businesses, organizations and school serve residents of Sampit, SC, the addresses of all of the businesses and organizations is in Georgetown, SC and the address of the school is Route 242, Georgetown, SC. Sampit's Declarations do nothing more than demonstrate that there is a neighborhood or section of Georgetown, South Carolina known as Sampit in which certain businesses and stores and an elementary school are located. Similar declarations could be obtained from the owner of the Uptown Theater, schoolteachers at Robert Eaton elementary school, or an officer of the Cleveland Park Historical Society attesting to the fact that the theater, the school and the historical society serve residents of the Cleveland Park section of Washington, D.C. Such statements would of course be true, but would have no credible weight in demonstrating that Cleveland Park is a distinct "community" for FCC allotment purposes.

Further, Sampit has still been unable to rebut LMC's argument that the entities bearing the "Sampit" trade name do so because of their proximity to the Sampit River as opposed to the community of Sampit. Report and Order at 8, note 11.

Thus, even if the untimely evidence contained in Sampit's Petition for Reconsideration is considered by the Commission, the totality of evidence submitted by Sampit fails to rebut the Report and Order's conclusion that "Sampit is a widely scattered rural area that appears to be similar in size to a township and could contain several communities." Report and Order at 9. It is abundantly clear that the Sampit Counterproposal and Petition

are merely an effort by Sampit to obtain an allocation to serve the nearby community of Georgetown, to which one AM and three FM stations are already allocated.

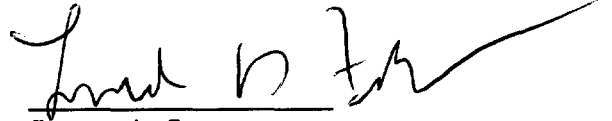
III. CONCLUSION

The Commission must deny Sampit's Petition for Reconsideration on both procedural and substantive grounds. LMC has clearly demonstrated that under existing Commission precedent, Sampit's Petition for Reconsideration is procedurally defective because, in contravention of Section 1.429(b) of the Commission's rules, it attempts to submit new matter that should have, and could have, been raised during the comment and reply comment period of this allotment proceeding. As demonstrated above, the Commission carefully analyzed the timely evidence submitted by Sampit at the comment and reply comment stage and correctly concluded that Sampit, SC is not a community for FCC allotment purposes. LMC respectfully submits that for the reasons set forth herein, the Commission must uphold this finding. Finally, even if the Commission considers the new evidence submitted by Sampit with its Petition for Reconsideration, the Commission must still find, as demonstrated above, that Sampit has failed to make the showing requisite in allotment proceedings that Sampit, SC is a community with "geographically identifiable population groupings" with a "nexus" to Sampit, SC. Accordingly, on the basis of the foregoing discussion, and for all of the reasons stated herein, LMC respectfully submits that the Commission must deny the Petition for Reconsideration filed by Sampit Broadcasters in this proceeding.

Respectfully submitted,

L.M. COMMUNICATIONS II
OF SOUTH CAROLINA, INC.

By:

A handwritten signature in black ink, appearing to read "Steven A. Lerman", written over a horizontal line.

Steven A. Lerman
Sally A. Buckman
Linda D. Feldmann

Leventhal, Senter & Lerman
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October 18, 1996

Its Attorneys

EXHIBIT 1

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October 4, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: L.M. Communications II of South Carolina, Inc.
WNST(FM), Moncks Corner, SC
MM Docket No. 94-70, RM-8474, RM-8706
Opposition to Petition for Reconsideration

Dear Mr. Caton:

L.M. Communications II of South Carolina, Inc. ("LMC"), licensee of FM radio broadcast station WNST, Moncks Corner, South Carolina, by its attorneys, hereby requests an extension of time to reply to the September 13, 1996 "Petition for Reconsideration" filed by Sampit Broadcasters in the above-referenced matter.

Under Section 1.429(f) of the Commission's rules, an Opposition to the Petition for Reconsideration is due on October 8, 1996 (see also 61 Fed. Reg. 49972 (1996)). In order to provide LMC with sufficient time to prepare an appropriate opposition, LMC respectfully requests a 10-day extension, to and including October 18, 1996, to file its opposition. Undersigned counsel has contacted counsel to Sampit Broadcasters regarding this extension request, and he has consented to it.

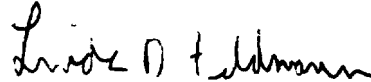
LEVENTHAL, SENTER & LERMAN

Mr. William F. Caton
October 4, 1996
Page -2 -

Accordingly, for the reasons set forth above, LMC hereby requests an extension of time, to and including October 18, 1996, to file its Opposition to the Petition for Reconsideration in the above-referenced matter.

In the event that there are any questions concerning this matter, please contact the undersigned.

Sincerely,

A handwritten signature in cursive script, appearing to read "Linda D. Feldmann".

Linda D. Feldmann

cc: Mr. John Karousos (By hand delivery)
Ms. Sharon P. McDonald (By hand delivery)
Gary Smithwick, Esq. (By hand delivery)

CERTIFICATE OF SERVICE

I, Karen M. Biscoe, do hereby certify that a true copy of the foregoing
Opposition To Petition for Reconsideration was hand-delivered, this 18th day of October 1996,
to the following:

Mr. John A. Karousos
Chief
Allocations Branch
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